

FEDERAL COURT OF AUSTRALIA

ASF17 v Minister for Immigration and Border Protection [2018] FCA 1149

Appeal from: *ASF17 v Minister for Immigration and Border Protection*
[2017] FCCA 2498

File number: WAD 580 of 2017

Judge: **BANKS-SMITH J**

Date of judgment: 3 August 2018

Catchwords: **MIGRATION** – appeal from decision of Federal Circuit Court of Australia – provision of bogus document – whether delegate held reasonable suspicion – where visa refused under s 91WA of the *Migration Act 1958* (Cth) – where delegate also considered protection obligations and Federal Circuit Court found error – where leave required to raise grounds not raised before Federal Circuit Court – no merit in grounds – appeal dismissed

Legislation: *Migration Act 1958* (Cth) ss 5(1), 5J(6), 36(2), 51A, 91WA

Cases cited: *APR15 v Minister for Immigration and Border Protection* [2017] FCA 713
Minister for Immigration and Citizenship v Li [2013] HCA 18; (2013) 249 CLR 332
NAJT v Minister for Immigration [2005] FCAFC 134; (2005) 147 FCR 51
Re Refugee Review Tribunal; Ex parte Ala [2000] HCA 57; (2000) 204 CLR
Sun v Minister for Immigration & Border Protection [2016] FCAFC 52; (2016) 243 FCR 220
VUAX v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 158; (2004) 238 FCR 588

Date of hearing: 10 May 2018

Registry: Western Australia

Division: General Division

National Practice Area: Administrative and Constitutional Law and Human Rights

Category: Catchwords

Number of paragraphs: 50

Counsel for the Appellant: The Appellant appeared in person with the assistance of an interpreter

Counsel for the Respondent: Mr PR Macliver

Solicitor for the Respondent: Australian Government Solicitor

ORDERS

WAD 580 of 2017

BETWEEN: **ASF17**
 Appellant

AND: **MINISTER FOR IMMIGRATION AND BORDER**
 PROTECTION
 Respondent

JUDGE: **BANKS-SMITH J**

DATE OF ORDER: **3 AUGUST 2018**

THE COURT ORDERS THAT:

1. 1. Leave to rely upon the grounds in the notice of appeal is refused.
2. 2. The appeal is otherwise dismissed.
3. 3. The appellant to pay the respondent's costs to be assessed if not agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BANKS-SMITH J:

1 1 The appellant arrived in Australia as an unauthorised maritime arrival in 2013. In September 2015 the Minister exercised his discretion to allow the appellant to make an application for a protection visa - Safe Haven Enterprise Visa (SHEV), and the appellant made such an application.

2 2 The Minister's delegate in determining the application found that the appellant had submitted a bogus document and so refused to grant a visa by reason of s 91WA of the *Migration Act 1958* (Cth) (Act). The delegate also considered and rejected the appellant's protection claims.

3 3 The appellant sought a review of the delegate's decision from the Federal Circuit Court. The primary judge found that there was error on the part of the delegate in an aspect of his determination of the protection claims, but that despite the error, the appellant was not entitled to relief because in light of the bogus document, the delegate was obliged under s 91WA to refuse to grant the appellant a visa: *ASF17 v Minister for Immigration and Border Protection* [2017] FCCA 2498.

4 4 The appellant now appeals from the primary judge's decision.

Summary of appellant's claims before the delegate

5 5 The appellant claims that he is a stateless and undocumented Faili Kurd from Iran. He said that although he stated in his arrival interview that he was an Iranian citizen, that information was wrong and that he was told by other people to pretend to be an Iranian citizen. He denied claims that he had made during his arrival interview that he had done military training. He claimed that he feared that his status and ethnicity would mean that he would be denied access to basic services, and that throughout his life he had faced persecution and discrimination as a stateless and undocumented Faili Kurd. The appellant also claimed that he had converted to Christianity and although he had not yet been baptised, his change in religion would put him at risk of persecution in Iran.

The delegate's decision

6 6 The delegate refused the SHEV application on two grounds. He refused it under s 91WA(1) of the Act. Section 91WA provides that:

Providing bogus documents or destroying identity documents

- (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
 - (a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or
 - (b) the Minister is satisfied that the applicant:
 - (i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or
 - (ii) has caused such documentary evidence to be destroyed or disposed of.
- (2) Subsection (1) does not apply if the Minister is satisfied that the applicant:
 - (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and
 - (b) either:
 - (i) provides documentary evidence of his or her identity, nationality or citizenship; or
 - (ii) has taken reasonable steps to provide such evidence.
- (3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.

7 7 The delegate also refused the visa application on the basis that the appellant did not satisfy s 36(2) of the Act, in that the delegate found that the appellant was not a person to whom Australia owed protection obligations.

The issue of identity

8 8 The delegate noted that in his arrival interview, the appellant claimed to be a person of Kurdish ethnicity and a citizen of Iran.

9 9 Later, the Department found an Iranian drivers licence in the appellant's possession which contained his biodata, image and a unique 10 digit national identity number which are only issued to citizens of Iran.

10 10 The appellant sought to rely on a black and white photocopy of an Identity Card for Foreign Nationals (National ID card) for the purpose of his visa application. The delegate concluded that it was a bogus document, submitted by the appellant to establish his identity.

11 11 Section 5(1) of the Act defines a bogus document as one that the Minister reasonably suspects is a document that:

- (a) (a) purports to have been, but was not, issued in respect of the person; or
- (b) (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) (c) was obtained because of a false or misleading statement, whether or not made knowingly.

12 12 Before making his determination on the SHEV application, the delegate wrote to the appellant on 26 September 2016 and invited him to provide a reasonable explanation for providing a bogus document and to produce other documentary evidence as to identity. The appellant provided a written response through a migration agent, claiming his father had obtained the document in 1998 or 1999 and handed over his family's 'green cards' in exchange for the National ID card(s). The appellant claimed he was provided with the National ID card by his father and always believed it to be a genuine document.

13 13 The delegate did not consider the explanation to be reasonable, taking into account that he found that the appellant was not a stateless Faili Kurd, but rather that he was an Iranian citizen of Kurdish ethnicity. The delegate assessed the National ID card to be bogus.

14 14 In substantiating his suspicion and coming to his conclusion, the delegate took into account his 'findings of fact'. In summary, those findings of fact were:

- (d) (a) the appellant was not a credible, truthful or reliable witness, and there were irreconcilable inconsistencies in his evidence;
- (e) (b) the appellant provided inconsistent information in his arrival interview and his protection visa application;
- (f) (c) it was not plausible that the appellant would have been able to save the amount of money he claimed he paid to obtain fraudulent documents and travel to Australia;
- (g) (d) the appellant said he had worked on his father's farm and country information suggests identity documents are required to own a house or land in Iran, suggesting the appellant and his family are not undocumented persons;
- (h) (e) country information suggests drivers licences are only issued to persons with an Iranian National Card, which is only issued to Iranian nationals, and the drivers licence found by the Department was an original document and found to be genuine;

- (i) (f) until it was found in his possession the appellant had not mentioned that he had an Iranian drivers licence;
- (j) (g) in his arrival interview the appellant suggested he had left Iran for a combination of economic and personal reasons, but in his written statement before the delegate he claimed he left because he faced persecution as a stateless and undocumented Faili Kurd;
- (k) (h) the appellant was unable to demonstrate personal knowledge of life as a stateless and undocumented Faili Kurd in Iran; and
- (l) (i) the appellant claimed to have travelled in and out of Iran without difficulty and claimed he had a bogus passport, but country information suggests it is extremely difficult to leave Iran with a bogus passport as there are various checkpoints throughout the airport: the appellant's ease of departing Iran suggested that he was an Iranian citizen who left lawfully on his own passport.

15 15 As he was satisfied that the National ID card is bogus, the delegate was required under s 91WA(1) of the Act to refuse to grant a protection visa to the appellant.

16 16 Despite this finding, the delegate proceeded to consider the appellant's claims for protection.

17 17 In addition to the findings referred to above and his consideration of country information concerning the situations of Faili Kurds in Iran, the delegate considered the appellant's claims that he had converted to Christianity in Australia. He was satisfied that the appellant had attended Church and Bible studies but considered it was done for the reason of strengthening his claim for refugee status, and so he rejected the activities under s 5J(6) of the Act. The delegate said that in light of his 'highly significant concerns' about the appellant's credibility he did not accept that the appellant had genuinely converted to Christianity and that he would therefore face persecution on account of his religion if he was returned to Iran.

18 18 The delegate accepted that the appellant would be returning to Iran as a failed asylum seeker.

19 19 As a result of the delegate's finding that the appellant was an Iranian citizen of Kurdish ethnicity, he did not accept that the appellant ever faced persecution in Iran on account of being a stateless and/or undocumented Faili Kurd.

20 Ultimately the delegate was not satisfied that the appellant met the criteria for the grant of a SHEV in ss 36(2)(a) and 36(2)(aa) of the Act (the refugee and complementary protection provision criteria respectively).

Proceedings before the Federal Circuit Court

21 It followed from the finding as to a bogus document that the appellant was an 'excluded fast track review applicant' as defined in s 5(1) of the Act and so not entitled to review by the Immigration Assessment Authority under Part 7AA of the Act.

22 The appellant sought judicial review of the delegate's decision by the Federal Circuit Court.

23 The application before the primary judge contained 3 grounds. These were (without correction):

1. I am Faili Kurdish/stateless.
2. I have converted to Christianity.
3. Racial discrimination and ethnicity

24 The primary judge treated these grounds as an assertion directed to the question of whether the appellant satisfied the criteria for the grant of a SHEV, a question reserved to the delegate by the Act.

25 The Federal Circuit Court was satisfied that the appellant was an 'excluded fast track review applicant' within the meaning of s 5(1) of the Act, on the basis the delegate had formed the view the appellant had, without reasonable explanation, provided to the Department or Minister a bogus document in support of his application.

26 However, the primary judge raised and addressed an argument that the delegate may have constructively failed to exercise his jurisdiction by applying s 5J(6) of the Act to its finding under the complementary protection provision in s 36(2)(aa) of the Act, rather than only to s 36(2)(a).

27 Section 5J(6) provides:

In determining whether the person has a well-founded fear of persecution for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

28 28 The question of whether a person has a well-founded fear of persecution is relevant to the criterion in s 36(2)(a), but not to the criterion in s 36(2)(aa) of the Act. Therefore, if the delegate failed to consider conduct which might have been relevant to the criterion in s 36(2)(aa) because he wrongly applied s 5J(6) of the Act, then it is at least arguable that the delegate constructively failed to exercise his jurisdiction.

29 29 The primary judge found that the delegate expressly put out of consideration the appellant's religious activities in Australia and that as those activities were relevant to the genuineness of the appellant's conversion to Christianity, the delegate's conclusion was affected by s 5J(6) of the Act. The delegate did not give separate consideration to that issue for the purpose of s 36(2)(aa) of the Act and did not consider how this might affect the risk of significant harm in Iran.

30 30 Although the primary judge found error in the delegate's treatment of the appellant's protection claims, it did not affect the outcome. His Honour accepted that in any event the delegate was under no obligation to consider the appellant's protection claims because the delegate was bound to refuse the application under s 91WA of the Act due to the conclusion with respect to the bogus document.

31 31 The question of whether the National ID card was bogus was a matter for the Minister (in this case the delegate) and the delegate expressly referred to the s 5 definition. The delegate was required to hold a 'reasonable suspicion'. It is open to the court to examine the factual basis upon which the delegate concluded that he 'reasonably suspected' that the National ID card fell within the definition of 'bogus document': *Sun v Minister for Immigration & Border Protection* [2016] FCAFC 52; (2016) 243 FCR 220 at [83].

32 32 As to the delegate's conclusion, the primary judge found that:

Critically, the delegate explains that one of the matters substantiating his conclusion, was that the applicant had been found in possession of an original Iranian driving licence 'bearing his biodata details, image and a unique 10 digit national identity number which are only issued to citizens of Iran'. Clearly enough, the possession of such a document, is a reasonable basis for suspecting that a document which states that the applicant was a foreigner was either not issued in respect of the applicant or was counterfeit.

In light of that, and the fact that the delegate was not satisfied that the applicant had provided a reasonable explanation for providing the National ID card, s 91WA of the Act was engaged. The consequence of that engagement, is that the delegate was bound to refuse to grant the applicant a visa.

33 Therefore, despite finding that the delegate's decision was affected by error, the primary judge refused relief as the delegate was bound by the Act to refuse the application: *Re Refugee Review Tribunal; Ex parte Ala* [2000] HCA 57; (2000) 204 CLR 82 at [58].

The appeal to this Court

34 The appellant seeks to have the Federal Circuit Court's judgment of 2 November 2017 quashed on the following grounds (without correction):

1. The first respondent's decision on 2 November 2017 be quashed.
2. The respondent decision was unreasonable.
3. The respondent took into account irrelevant considerations.
4. The respondent's decision involved an error of law.
5. The respondent in making the decision did not comply with rules of natural justice and the applicant was denied procedural fairness.
6. The respondent failed to take into account relevant considerations.
7. The decision was in breach of the ministerial direction no 65 as Australia's non Refoulement obligation stated.

35 There are some difficulties with these grounds. The appellant is unrepresented and appeared before me with the assistance of an interpreter, and I do not ignore the difficulties faced by him in enunciating and particularising appeal grounds.

36 However, ground 1 is not a ground of appeal. The other grounds do not point to error on the part of the primary judge. The grounds address the delegate's decision and were not raised before the primary judge. At the hearing, and as anticipated by the Minister in his written outline, I treated the notice of appeal as including an application for leave to include the above grounds.

37 Leave to rely on grounds not raised before the primary judge may be granted where it is expedient in the interests of justice to do so. The court may grant leave if some point that was not taken below, but clearly has merit, is advanced, and there is no real prejudice to the respondent in permitting it to be agitated. Leave should generally be refused if the proposed new ground is of doubtful merit: *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 158; (2004) 238 FCR 588 at [46]-[48]; *NAJT v Minister for Immigration* [2005] FCAFC 134; (2005) 147 FCR 51 at [154]-[166]; *APR15 v Minister for Immigration and Border Protection* [2017] FCA 713 at [10].

38 In order to consider the merits of a leave application, it is necessary to give some consideration to the merits of the grounds raised and consider whether they have a reasonable prospect of success.

39 The grounds lack any particulars. Nothing emerged in the course of the hearing that further exposed any alleged error or particularised the complaints. Matters raised by the appellant during the hearing were that the primary judge provided only three days for him to prepare for the hearing, and that he does not accept he is Iranian and wants the Minister to prove that is the case.

Proposed ground 2 (unreasonableness)

40 In relation to ground 2 the Minister submits that there is nothing in the delegate's decision that demonstrates any form of legal unreasonableness, irrationality or illogicality. Leaving aside the issue as to s 5J(6) and the error referred to by the primary judge (which did not affect the outcome), I accept the Minister's submission. The delegate provided reasons for suspecting the National ID card was bogus and there is nothing irrational or illogical in his conclusion. The conclusion was reasonably open to him on the facts before him, as was his conclusion that he was not satisfied that the appellant had provided a reasonable explanation for providing the bogus document. The delegate sought to ascertain that the Iranian drivers licence was genuine before relying on it (as appears from an email in the court book provided to the Federal Circuit Court, and also from the fact that the delegate considered country information about drivers licences) and drew inferences from information that was consistent with the appellant being an Iranian citizen, as listed in his reasons. It was reasonably open to the delegate to draw such inferences. It was not for the Minister to prove the appellant was an Iranian citizen, as submitted by the appellant. The question is whether the Minister had reasonable grounds to suspect the National ID card was bogus. The delegate in any event pointed to a range of circumstances that informed his decision that the appellant is not a stateless Faili Kurd, but rather is an Iranian citizen of Kurdish ethnicity. Those circumstances are consistent with his finding. There is no unreasonableness in a *Li* sense disclosed (*Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332).

Proposed grounds 3 and 6 (relevant and irrelevant considerations)

41 Grounds 3 and 6 can be dealt with together. It is apparent from the delegate's reasons that he took into account the information that the appellant provided to the Department in the

protection visa application and interview, the information the appellant provided to the Department in other interviews, the information provided by the appellant in response to the letter of 26 September 2016 and relevant country information. The appellant has not particularised any matter that was not considered or wrongly taken into account.

Ground 4 (error of law)

42 42 Leaving aside the issue as to s 5J(6) addressed by the primary judge, there is no identified error of law in the delegate's decision. The delegate was correct in concluding that as a result of the delegate's conclusion that the appellant had, without reasonable excuse, provided a bogus document, the delegate was bound to refuse to grant the appellant a visa as s 91WA of the Act was engaged. The matters said above with respect to ground 2 are also relevant to ground 4. There is no error disclosed in the finding as to the National ID card being bogus. It follows that no error is disclosed with respect to the application of s 91WA of the Act.

Ground 5 (natural justice and procedural fairness)

43 43 Ground 5 asserts a denial of procedural fairness by the Minister (delegate). The Minister submits that the delegate complied with the requirements of the natural justice hearing rule articulated in s 51A of the Act (and see in particular s 54, s 55, s 57 and s 58 of the Act). The matters addressed with respect to grounds 3 and 6 are also relevant to ground 5.

44 44 The delegate must have regard to all the information provided in the application, including further documents provided before the hearing. The delegate is required to give particulars of information which would be the reason or part of the reason for refusing to grant a visa. This was done by the letter of 26 September 2016. The delegate was required to provide three working days to respond to such letter: in this case, that time was extended at the request of the appellant's agent (pp 190-191 of appeal book). The appellant was invited to attend an interview and did so. On the materials before me, and in the absence of any particulars as to the alleged denial of procedural fairness, I do not consider this proposed ground has any prospect of success.

45 45 I note that the complaint raised before me by the appellant about an alleged short notice period with respect to his hearing in the Federal Circuit Court is a complaint of lack of alleged procedural fairness by the Federal Circuit Court, and not by the delegate. This matter is not referred to in the notice of appeal. The appellant has provided no evidence as to the

manner in which the hearing before the Federal Circuit Court was listed or managed. It is not surprising that the Minister's counsel did not address such matters as they appear to have been raised for the first time at the hearing before me. The appellant attended the hearing in the Federal Circuit Court and the primary judge considered the review grounds in some detail. An opportunity to provide submissions (including after the hearing) was provided to the parties. I am not satisfied on the material before me that the appellant has any prospect of establishing a lack of procedural fairness on the part of the primary judge, and to the extent the oral submission comprised a further application to amend his grounds, I would decline leave.

Ground 7

46 46 Ground 7 asserts that the delegate's decision was made in breach of Ministerial Direction No 65. Direction No 65 has no application in this case.

Determination

47 47 For the reasons set out above, and subject to one qualification, I am not satisfied that the appellant should be granted leave to rely upon the grounds of appeal in relation to the decision of the delegate. None of the grounds has merit. Even if leave were granted, I consider the appeal would have no prospect of success and would be dismissed.

48 48 The qualification is that it is arguable that no leave is required with respect to the appeal grounds insofar as they might be said to encompass the question of whether there was error in the delegate's conclusion that the National ID card was bogus. That matter was clearly addressed by the primary judge and I discern no error in the manner in which the primary judge addressed it. The primary judge tested whether there was a reasonable basis for the delegate's suspicion and gave reasons as to why he was satisfied that there was a reasonable basis. The primary judge's conclusion in that regard was entirely reasonable in the circumstances. On that basis, the appeal insofar as it seeks to address that ground is dismissed.

49 49 Finally, even if the notice of appeal had been construed as a contention that there was appellable error on the part of the primary judge (rather than the delegate), the appeal still would have been dismissed. Leaving aside the allegation as to procedural fairness (which I have already dealt with), no grounds were particularised as to appellable error on the part of the Federal Circuit Court. As appears from the summary of proceedings above, I have

considered the reasons given by the primary judge. His Honour properly considered the grounds of review before him and carefully considered whether there was any other error identified. His Honour in fact found error, albeit that it did not alter the outcome.

50 50 Accordingly, leave to rely upon the grounds in the notice of appeal is refused and the appeal is otherwise dismissed with costs.

I certify that the preceding fifty (50) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Banks-Smith.

Associate:

Dated: 3 August 2018